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Codification and Progressive Development of International Law: A Legislative History of Article 13(1)(a) of the Charter of the United Nations

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CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW: A LEGISLATIVE HISTORY OF ARTICLE 13(1)(A) OF THE CHARTER OF THE UNITED NATIONS

Arnold N. Pronto*

ABSTRACT

Although the movement to “codify” the rules and principles of international law predates the Charter of the United Nations, it was with the adoption of Article 13(1)(a) thereof, and subsequent establishment of the International Law Commission, that the codification movement came into its own. While the notion of “codification” was well-understood by 1945, it was nonetheless included in the Charter in a novel way, in a dichotomy with the concept of “progressive development.” This paper seeks to provide a comprehensive legislative history of Article 13(1)(a), drawing from the *travaux préparatoires* of the San Francisco Conference. It focuses, in particular, on the origins of the introduction of the concept of “progressive development” and the connection with the problem of revision.

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I. INTRODUCTION

The impulse to systematize the rules and principles of international law in a “code” predates the Charter of the United Nations. Depending on one’s understanding of the concept of “codification,” such efforts stretch back hundreds of years, if not longer. In its modern guise, one may trace its history to the ideas of Jeremy Bentham, and others.¹ It is a common feature of modern international relations that states not only resort to treaties by way of guaranteeing their accommodations reached *inter se*, but also to lay down, in an expository manner, the rules of international law more generally. Modern treaty collections contain numerous examples of such treaties (or treaties with some provisions purporting to codify the law more generally). The codification of international law has become part and parcel of the modern liberal project which has sought to regulate the relations between nation states through a rule-based system.

It is not too far-fetched to argue that interest in such activities has historically peaked in the aftermath of major conflict. The resort to law, as opposed to war, in settling international disputes has a long pedigree, again primarily as a manifestation of the liberal worldview. The peace agreement negotiated at the Congress of Vienna, in 1815, included several embryonic efforts at codifying the rules of international law generally, in relation to international rivers, the abolition of slave trade, and the recognition of diplomatic envoys. So, too, the political settlement established after the First World War in the Versailles Treaty² was anchored in a newly established international legal architecture. The modern codification movement was propelled forward by concerted action undertaken in the wake of both world wars.

This is not to deny the existence of major codification efforts during peacetime. Numerous major international conferences have been held, and treaties concluded, during peacetime, including in the years immediately prior to the First World War.³ Rather, the assertion being made is that the international settlement following major conflicts (initially in Europe, but in more recent times, throughout the world) provided the framework for subsequent efforts at codifying rules of international law at the global level.

¹ For an overview of early codification proposals and efforts, see UNITED NATIONS SECRETARIAT, THE WORK OF THE INTERNATIONAL LAW COMMISSION 1–3, U.N. Sales No. E.17.V.2 (9th ed. 2017).

² Treaty of Versailles, June 28, 1919, 1919 U.S.T. 42.

³ Perhaps the most well-known examples are the 1899 and 1907 Hague Peace Conferences, which reached agreement on several conventions relating generally to the laws of war and to the pacific settlement of disputes. See THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES, TRANSLATION OF THE ORIGINAL TEXTS VOLUMES I–IV: THE CONFERENCES OF 1899 AND 1907 (W.S. Hein 2000); see also *Historical Survey of the Development of International Law and its Codification by International Conferences*, U.N. Doc. A/AC.10/5, reprinted in 41 AM. J. OF INT’L L. 29 (1947).

In the early years, such efforts were primarily motivated by the hope that the imposition of rules would help ameliorate the conditions that might lead to a reversion to war. In more recent times, such basic concerns have been supplemented by the impulse, *inter alia*, to improve the plight of human beings and the environment.

The United Nations' predecessor, the League of Nations, although not expressly entrusted with the task of codifying international law, nonetheless undertook several initiatives aimed at doing precisely that (at least in relation to certain aspects). In 1927, the League of Nations convened a diplomatic conference to codify several topics of international law, identified by a Committee of Experts as being sufficiently "ripe" for international agreement. The conference was held at The Hague, from 13 March to 12 April 1930, and resulted in the negotiation of four instruments concerning nationality.⁴ Although of limited success,⁵ the Hague Codification Conference was the first global (as it then was) attempt at codifying entire fields of international law more generally, rather than addressing specific legal problems. However, it was with the adoption of the Charter of the United Nations, in 1945, that the codification movement came into its own. Article 13(1)(a) of the Charter empowers the General Assembly of the United Nations, *inter alia*, to:

initiate studies and make recommendations for the purpose
of encouraging the progressive development of international
law and its codification.

This provision has served as an important basis for contemporary work on the codification of international law. In particular, it has provided the mandate for the work of the International Law Commission (ILC), the primary subsidiary body of the General Assembly entrusted with the task of fulfilling the mandate in Article 13. The ILC has carried out this mandate continuously over the last seventy years, resulting in the development of a significant body of rules and principles of international law.

Despite being relatively well-established in 1945, the concept of "codification" was reflected in the Charter of the United Nations in a novel way, as one part of a dichotomy with the element of "progressive development." This did two things. First, it introduced a new concept

⁴ The Convention on Certain Questions Relating to the Conflict of Nationality Laws, Apr. 12, 1930, 179 L.N.T.S. 89–113; Protocol Relating to Military Obligations in Certain Cases of Double Nationality, Apr. 12, 1930, 178 L.N.T.S. 227–38; Protocol Relating to a Certain Case of Statelessness, Apr. 12, 1930, 179 L.N.T.S. 115–26; *Special Protocol Concerning Statelessness*, League of Nations Doc. C.27.M.16.1931.V (1930).

⁵ The Conference was unable to agree on any conventions concerning the other two topics before it (territorial water and state responsibility).

(“progressive development”) into the lexicon of international law-making. Secondly, it led to a subtle shift in the received understanding of the meaning of “codification,” which since then has been construed in contra-distinction to “progressive development.”

This paper considers the first proposition, and seeks to provide a comprehensive legislative history of Article 13(1)(a), focusing on the *travaux préparatoires* of the San Francisco Conference.⁶ In doing so, it will explore the origins of the introduction of the “progressive development” element and demonstrate, in particular, its connection with the problem of the revision of treaties (and that of international law more generally).

II. THE DRAFTING HISTORY OF ARTICLE 13(1)(A)

Two preliminary reflections are worth noting at the outset. First, while many provisions of the Charter barely feature in the official records of the San Francisco Conference, or do so in a rather perfunctory manner (as having largely been agreed to before the conference), this is not the case with Article 13(1)(a), which was discussed, in its various manifestations, on several occasions throughout the conference, leaving the reader with a relative wealth of material to contemplate and draw inferences from.

The second, more substantive, initial reflection is the link between what came to be adopted as “progressive development of international law” and prevailing concerns about the revision of international law. It is not always fully appreciated that, as will be demonstrated below, the origins of the codification versus progressive development dichotomy are to be found in the debate on the revision of international law, as it played out during the inter-war period. An analysis of the discussion in San Francisco reveals, *inter alia*, that the drafters had an inherently quasi-revisionary exercise in mind when coming to the notion of the “progressive development.”

A. *Dumbarton Oaks Proposals*

The Four Power Declaration⁷ adopted, in Moscow in 1943, by the United States, the Soviet Union, the United Kingdom and the (then) Republic of China, called for the establishment of a new international organization to succeed the League of Nations. The process of establishing such organization was set into motion at a conference held from August to October 1944 in

⁶ See U.N. Conference on International Organization, *Documents of the United Nations Conference on International Organization*, U.N. Doc. G/8/11 (Vols. I–XXI) (May 28, 1945) [hereinafter *Documents*].

⁷ Moscow Conference of Foreign Secretaries, *Declaration of the Four Nations on General Security* (Oct. 30, 1943).

Dumbarton Oaks (Washington, D.C.), attended by the same four powers. Owing to the fact that the Soviet Union did not recognize the representatives from China, the conference proceeded in two phases, with the first involving negotiations between the United States, the Soviet Union and the United Kingdom, which resulted in the “Dumbarton Oaks Proposals for a General International Organization” (hereinafter the “Dumbarton Oaks Proposals”).⁸ In the second phase, the United States and the United Kingdom held discussions with the representatives of China, during which the latter representatives made a series of proposals. All four governments agreed to submit the *Dumbarton Oaks Proposals*, together with three Chinese proposals to the United Nations Conference on International Organization, convened in San Francisco, in 1945.

The *Dumbarton Oaks Proposals* contained minimal reference to “international law.” Provision was made for the establishment of an international court of justice,⁹ to which “justiciable disputes” were to be referred, and from which the envisaged Security Council could seek advice on “legal questions”¹⁰; and for the exclusion of disputes arising out of matters which, under international law, were solely within the domestic jurisdiction of the state concerned.¹¹ However, of the three proposals put forward by the Chinese Government, two dealt specifically with international law, of which the second read:

[t]he [General] Assembly should be responsible for initiating studies and making recommendations with respect to the development and revision of the rules and principles of international law.¹²

B. San Francisco Conference

The San Francisco Conference was held from 25 April to 26 June 1945 and was open to the 50 allied nations (known collectively as “the United Nations”), including the four sponsoring powers. The *Dumbarton Oaks Proposals* (including the Chinese proposals) served as the basis for the

⁸ See generally U.N. Conference on International Organization, *Dumbarton Oaks Proposals Comments and Proposed Amendments*, in 3 *Documents of the United Nations Conference on International Organization* (1945) [hereinafter *Documents* Vol. III].

⁹ *Id.* at 11–12.

¹⁰ *Id.* at 14.

¹¹ *Id.*

¹² *Id.* at 25. The other proposal was as follows: “The Charter should provide specifically that adjustment or settlement of international disputes should be achieved with due regard for principles of justice and international law.”

negotiations. The conference proceeded in phases. Most delegations submitted written proposals for amendment to the *Dumbarton Oaks Proposals* in advance of the conference. Upon convening, delegations took the opportunity of the plenary debate, held over eight sessions from 26 April to 2 May 1945, to elaborate on their written proposals, and to make further proposals.

The draft text of the Charter was divided into four sections, each of which was to be studied by a Commission.¹³ The provision of the Charter, which subsequently became Article 13, was considered by Commission II (Functions of the General Assembly), chaired by the then Prime Minister of South Africa, General Jan C. Smuts (1870–1950).¹⁴ Further debate on the various proposals, including those relating to what became Article 13, was held in the plenary of Commission II over four meetings (from 30 May to 21 June 1945). Smuts, in turn, distributed the work among four Committees.¹⁵ Although some discussion was held elsewhere, Article 13 was negotiated in the second such Committee (Committee II/2), dealing with the functions and powers of the General Assembly.¹⁶

The Plenary of the Conference, at its ninth session, held on 25 June 1945, adopted the reports of, *inter alia*, all four Commissions, and then proceeded to adopt the Charter of the United Nations as a whole.

C. *Proposals Submitted to the San Francisco Conference*

A number of the proposals submitted in writing to the San Francisco Conference made express reference to the role of international law. While the focus of the present paper will be on proposals relating to the development of international law (the subject matter of Article 13(1)(a)), it is worth

¹³ The first was responsible for the organization's purposes, principles, membership, secretariat, and the question of amendments to the Charter. The second considered functions of the General Assembly. The third dealt with the Security Council. The fourth dealt with the assessment of the draft Statute of the International Court of Justice, which had been drafted by a team of legal experts from 44 countries, meeting in Washington, D.C., in April 1945.

¹⁴ General Smuts enjoyed the rare distinction of having played a role in the establishment of both the League of Nations and the United Nations, and, in addition to presiding over Commission II, was largely responsible for the Preamble of the Charter of the United Nations.

¹⁵ Committee II/1 (Structure and procedures of the General Assembly), Committee II/2 (Functions and powers of the General Assembly), Committee II/3 (ECOSOC), and Committee II/4: Trusteeship system. In the initial plan for the Charter, the latter two entities were envisaged as falling within the structure of the General Assembly. It was only later on that it was decided to raise both to the level of principal organs of the United Nations, alongside the General Assembly.

¹⁶ The Committee held 25 meetings from 4 May to 20 June 1945. It also established Subcommittees II/2/A and II/2/B. Some (more general) discussion was also held in the first Committee (Committee II/1).

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remembering that such proposals were put forward in a broader context of efforts by many participating Governments to anchor the envisaged Charter in international law.¹⁷

A number of the written proposals dealt with the possibility of granting the new organization a mandate to develop international law. Hence, Egypt, in its comments of 16 April 1945, opined that:

It would also be advisable that the new Organization should endeavour to further and develop International Law either by the channel of some special agency depending on the General Assembly, or through the existing Economic and Social Council. The rules now generally accepted as the Law of Nations, which are the outcome of the evolution of centuries of international practice, have often helped to avoid armed conflicts and to develop peaceful relations between different States. The weakness of International Law was that, contrary to all other branches of Law, its rules could not be enforced. Now, finally, military power is put at the disposal of a World Organization which is the latest expression of the Law of Nations, and the climax of a long process of international thought. It is more than ever necessary to determine and define those rules of International Law, now that they are being given that essential element of authority which hitherto they have lacked.¹⁸

It, accordingly, proposed the insertion of, *inter alia*, the following subparagraph into the provision relating to the powers of the General Assembly:

To determine, define, codify and develop the rules of international law and international morality.

¹⁷ For example, the Brazilian Delegation submitted an amendment to Chapter II (Principles), para. 2, of the *Dumbarton Oaks Proposals*, whereby “[a]ll members of the Organization [would] undertake, in order to insure to all of them the right and benefits resulting from membership in the Organization, to respect and carry out scrupulously the treaties and agreements to which they are parties and to fulfil the obligations assumed by them in accordance with the Charter.” U.N. Conference on International Organization, *Amendment to Dumbarton Oaks Proposals Submitted by the Brazilian Delegation*, U.N. Doc. 2 G/7(3)(1) (May 3, 1945), in *Documents* Vol. III, *supra* note 8, at 243.

¹⁸ U.N. Conference on International Organization, *Suggestions of the Egyptian Government on the Tentative Proposals of Dumbarton Oaks under examination at the United Nations Conference at San Francisco*, U.N. Doc. 2 G/7(q) (Apr. 16, 1945), in *Documents* Vol. III, *supra* note 8, at 448.

Similar drafting proposals were made by Australia (“for promoting the development and revision of the rules and principles of international law”)¹⁹ and Liberia (“[t]he General Assembly shall also initiate studies which should lead to the Codification of International Law”).²⁰ For its part, Lebanon somewhat presciently proposed the creation of:

a permanent Committee of Jurists whose function shall be the periodic codification or consolidation of existing principles of international law together with the modifications thereof which shall be deemed necessary from time to time.²¹

In its view, “[i]t [was] obvious that the precise formulation of the law of nations, brought always up-to-date in accordance with the development of the theory and practice of that law, [would] be a potent instrument for the maintenance of international peace and security.”²²

Iran proposed a similar amendment to Chapter XII (Transitional Arrangements) of the *Dumbarton Oaks Proposals*, to which the following subparagraph would be added:

A Committee of qualified Jurists should be established to draw up a code of International Law.²³

Some delegations went further and proposed endowing the General Assembly with the power to legislate international law. Hence, the Philippines was of the view that:

The General Assembly should be vested with the legislative authority to enact rules of international law which should become effective and binding upon the members of the Organization after such rules have been approved by a majority vote of the Security Council . . . In the exercise of

¹⁹ U.N. Conference on International Organization, *Amendments to the Dumbarton Oaks Proposals Submitted on Behalf of Australia*, U.N. Doc. 2 G/14(1) (May 5, 1945), in *Documents* Vol. III, *supra* note 8, at 546.

²⁰ U.N. Conference on International Organization, *Memorandum of the Liberian Government on the Dumbarton Oaks Proposals*, U.N. Doc. 2 G/14(a) (May 2, 1945), in *Documents* Vol. III, *supra* note 8, at 465.

²¹ U.N. Conference on International Organization, *Lebanon's Suggestions on the Dumbarton Oaks Proposals Which will be Submitted for Discussion in the United Nations Conference on International Organization to be Held in San Francisco on April 25, 1945*, U.N. Doc. 2 G/14(c) (May 2, 1945), in *Documents* Vol. III, *supra* note 8, at 473.

²² *Id.*

²³ U.N. Conference on International Organization, *Amendments Presented by the Delegation of Iran to the Dumbarton Oaks Proposals*, U.N. Doc. 2 G/14(m) (May 5, 1945), in *Documents* Vol. III, *supra* note 8, at 556.

this legislative authority the General Assembly may codify the existing rules of international law with such changes as the Assembly may deem proper.²⁴

Likewise, Ecuador envisaged the establishment of a “juridical community in which the Assembly and Council can perform the legislative and executive functions, respectively . . . ,”²⁵ and hence proposed the following amendment to be included among the powers of the General Assembly:

The power to establish or progressively amend the principles and rules of law which are to govern the relations between the States lies with the General Assembly, through a two-thirds majority of its members. The instruments embodying those principles and rules shall only come into compulsory effect for all members of the Organization when they are ratified by a number equivalent to a two-thirds part of it.²⁶

D. Consideration in Committee II/2

What is clear from the above is that by the time Committee II/2 turned its attention to the functions and powers of the General Assembly, it already had before it a number of proposals for the expansion of such functions to include the development of international law (whether by way of the authority to revise existing treaties or more generally). The basis of the discussion was paragraph 6 of Chapter V, section B, of the *Dumbarton Oaks Proposals*, which read:

The General Assembly should initiate studies and make recommendations for the purpose of promoting international cooperation in political, economic and social fields and of adjusting situations likely to impair the general welfare.²⁷

²⁴ U.N. Conference on International Organization, *Proposed Amendments to the Dumbarton Oaks Proposals Submitted by the Philippine Delegation*, U.N. Doc. 2 G/14(k) (May 5, 1945), in *Documents* Vol. III, *supra* note 8, at 536–37.

²⁵ U.N. Conference on International Organization, *Delegation of Ecuador to the United Nations Conference on International Organization*, U.N. Doc. 2 G/7(p) (May 1, 1945), in *Documents* Vol. III, *supra* note 8, at 404.

²⁶ *Id.* at 427.

²⁷ U.N. Conference on International Organization, *The United Nations Dumbarton Oaks Proposals for a General International Organization*, U.N. Doc. 1 G/P, in *Documents* Vol. III, *supra* note 8, at 6.

An initial step was taken at the third meeting of Committee II/2, held on 9 May 1945, when the United States, on behalf of the four “sponsoring” powers and France, proposed the following amendment to paragraph 6, which was adopted without reservations:

The General Assembly should initiate studies and make recommendations for the purpose of promoting international cooperation in political, economic, social and cultural fields to assist in the realization of human rights and basic freedoms for all, without distinction as to race, language, religion or sex *and also for the encouragement of the development of international law*.²⁸

Subsequently, Committee II/2 requested Subcommittee A to review all the written proposals and views expressed by delegations, together with the amendment adopted on May, and to systematize all the issues raised therein into a series of questions to be considered by the Committee.²⁹ The Subcommittee subsequently submitted a report containing several questions organized under three categories of issues: (1) pertaining to the development of the rules and principles of international law more generally; (2) concerning the revision of treaties; and (3) relating to the power of the General Assembly to formulate general conventions.³⁰ Of the three, the second, concerning the power to impose the revision of treaties, proved to be the most contentious.

1. The Development of International Law: Recommendations Versus Legislation

The first set of questions contrasted two approaches to developing international law. On the one hand, the General Assembly of the future organization would only have the power to initiate studies with a view to making recommendations aimed at the development of the law. The alternative approach was to endow the Assembly with legislative authority to make and impose law. While the initial proposal by the Chinese delegation, and those of several other delegations, had favored the more cautious approach, several delegations (including, for example the Philippines, as referred to above) had called for a more robust set of powers to be awarded to the General Assembly. More than just a philosophical difference of

²⁸ U.N. Conference on International Organization, *Summary Report of the Third Meeting of Committee II/2*, U.N. Doc. 203 II/2/8 (May 10, 1945), in 9 *Documents of the United Nations Conference on International Organizations* 21–22 (1945) [hereinafter *Documents* Vol. IX] (emphasis added).

²⁹ See U.N. Conference on International Organizations, *Summary Report of the Eighth Meeting of Committee II/2*, U.N. Doc. 392 II/2/17 (May 18, 1945), in *Documents* Vol. IX, *supra* note 28, at 53.

³⁰ See U.N. Conference on International Organizations, *Second Report of Subcommittee A*, U.N. Doc. 416 II/2/A/3 (May 18, 1945), in *Documents* Vol. IX, *supra* note 28, at 346–48.

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approach, the two options reflected starkly different visions of the nature, role, and powers of the international organization being established.

Four questions were developed, two for each approach. The questions were put to the vote at the tenth meeting of Committee II/2, held on 21 May 1945. The official record of the meeting (reproduced below *in extenso*) described the outcome as follows:

The Chairman put question 1 to the vote, as follows:

Should the Assembly be empowered to initiate studies and make recommendations for the codification of international law?

Decision: 27 affirmative votes, 8 negative; Question 1 affirmed;

The Chairman put question 2 to the vote, as follows:

Should the Assembly be empowered to initiate studies and make recommendations for promoting the revision of the rules and principles of international law?

Decision: 16 affirmative votes, 7 negative; Question 2 affirmed;

The Chairman put question 3 to the vote, as follows:

Should the Assembly be authorized to enact rules of international law which should become binding upon members after such rules shall have been approved by the Security Council?

Decision: 1 affirmative vote, 26 negative; Question 3 negated;

The Chairman put question 4 to the vote as follows:

Should it be provided that upon the failure of the Security Council to act on such rules within a period specified in the Charter, they should become effective and binding, in the same manner as if they had been approved by the Security Council?

Decision: no affirmative vote, 26 negative; Question 4 negated.³¹

Therefore, by a series of votes the Committee rejected the possibility of granting the General Assembly legislative powers, opting instead only for the power to make recommendations, based on studies the Assembly had

³¹ U.N. Conference on International Organizations, *Summary Report of Tenth Meeting II/A*, U.N. Doc. 506 II/2/202 (May 23, 1945), in *Documents* Vol. IX, *supra* note 28, at 69–70.

previously initiated. The first two (affirmative) decisions also established, for the first time, the two prongs of the scope *ratione materiae* of the recommendations being envisaged, namely: for the “codification of international law” and for what was then referred to as “promoting the revision of the rules and principles of international law.” The concept of “progressive development” had not yet found its way into the lexicon of the conference.³²

2. Revision of Treaties

The proposal to grant the General Assembly the power to make recommendations aimed at the further development of international law, first proposed by the Chinese Government, gave rise to some debate both in the Plenary and in Commission II. The source of contention was less the basic idea, which faced little opposition, and arose more as a consequence of the manner in which the debate was framed. From the beginning (including the Chinese proposal), many of the proponents of granting the General Assembly enhanced powers linked their proposals to the question of the “revision” of existing rules of international law, particularly treaties, as a component of the broader debate on peaceful change and adjustment of situations giving rise to international disputes, which had arisen during the inter-war period.

Article 19 of the Covenant of the League of Nations had granted the Assembly of the League the authority to:

[F]rom time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world.

While the League Assembly never exercised such authority, the problem of unfair or onerous treaties was the source of much tension at the international level during the inter-war period, and in the case of one particular treaty, the Versailles Treaty, lay at the origin of the return to war (in Europe).

In referring to the “revision of the rules and principles of international law,” the initial Chinese proposal at Dumbarton Oaks had resurrected the possibility of such authority also being granted to the General Assembly of the soon to be established United Nations. Some delegations, the Chinese included, came to the San Francisco Conference with a vivid history of grievances arising from the imposition of treaties enshrining hegemonic rule.

³² An early reference was to be found in an Ecuadorean proposal, dated 1 May 1945, which referred to the power to “progressively amend the principles and rules of law.” See *supra* note 25 and accompanying text.

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For many such states, the promise of a new world order in the proposed Charter of the United Nations implied the possibility of being released from such treaties. They held out the hope that the General Assembly, like the League Assembly before it, would be empowered to make peaceful adjustments to the situations giving rise to conflict, including such situations arising from the imposition of unfair treaties.

For example, Egypt maintained that:

with a view of harmonizing international relationships, we suggest it as a duty of the Conference to prescribe principles for the revision of treaties which have become inconsistent with the new concept of world conditions and collective security and might therefore become irritants and a possible source of conflict.³³

In the context of the work in Committee II/2, Egypt proposed a drafting amendment to add, *inter alia*, the following to the powers of the General Assembly:

to advise on the request of any member concerned the reconsideration of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace...³⁴

Similarly, Lebanon expressed the view that:

[i]t is obvious that the precise formulation of the law of nations, *brought always up to date* in accordance with the development of the theory and practice of that law, will be a potent instrument for the maintenance of international peace and security.³⁵

Haiti pointed out that:

[i]t does not seem superfluous to us to add here that international law cannot remain static, no more than civil or penal law. It must be *capable of adapting itself* to the changing conditions of life of the peoples of the world.³⁶

³³ U.N. Conference on International Organization, *Verbatim Minutes of the Third Plenary Session*, U.N. Doc. 22 P/7 (Apr. 29, 1945), in 1 *Documents of the United Nations Conference on International Organizations* 236 (1945) [hereinafter *Documents* Vol. I].

³⁴ U.N. Conference on International Organizations, *Report by the Officers on Grouping of Suggested Modifications to Dumbarton Oaks Proposals*, U.N. Doc. 326 II/2/7(2), annex 2 (May 12, 1945), in *Documents* Vol. IX, *supra* note 28, at 315.

³⁵ U.N. Conference on International Organizations, *Verbatim Minutes of the Third Plenary Session*, U.N. Doc. 22 P/7 (Apr. 29, 1945), in *Documents* Vol. I, *supra* note 33, at 251 (emphasis added).

³⁶ U.N. Conference on International Organizations, *Verbatim Minutes of the Sixth Plenary Session*, U.N. Doc. 55 P/13 (May 2, 1945), in *Documents* Vol. I, *supra* note 33, at 443 (emphasis added).

Subsequently (during the discussion in Committee II/2), Brazil proposed that the Charter provide that:

[a]t the request of any contracting party to an executory treaty, who alleges the total or partial caducity of the same, or the injustice of its continuation, the Assembly by a two-thirds majority shall invite one or the other contracting parties to come to agreement with the first for the revision or cancellation of such treaty. If any of the contracting parties are not in agreement with the said revision or cancellation, the other one or more contracting parties shall be authorized to resort to the permanent international court of justice, in order that the latter by judgment may decide if the treaty in question has lost all or part of its compulsory force because of the fact that the conditions determining its execution have changed or that the treaty itself has become unjustly onerous for one or the other of the parties.³⁷

Belgium, responding to criticism expressed by France (see below), observed that:

the Organization would give up a great part of its possibilities for helping the peace if the General Assembly were to exclude consideration of any dangerous situation which might arise directly or indirectly out of certain treaties.³⁸

Other governments were strongly opposed to granting the General Assembly the authority to impose adjustments of situations, including the power to recommend the revision of treaties. For them, the possibility of imposing the revision of treaties, necessarily against the will of one of more parties thereto, was itself a potential source of instability, especially since the collective security arrangement which emerged from the Second World War was to be anchored in treaties (the most prominent of which being the Charter itself). For them, the stability of treaties was of paramount importance.

Hence, France, drawing the opposite historical lesson from the existence of Article 19, recalled that:

in Article 19 of the Covenant were special provisions concerning the revision of treaties by the League. There is

³⁷ U.N. Conference on International Organizations, *Report by the Officers on Grouping of Suggested Modifications to Dumbarton Oaks Proposals*, U.N. Doc. 326 II/2/7(2), annex 2 (May 12, 1945), in *Documents* Vol. IX, *supra* note 28, at 313–14.

³⁸ U.N. Conference on International Organizations, *Verbatim Minutes of the Fourth Meeting of Commission II*, U.N. Doc. 1151 II/17 (June 22, 1945), in 8 *Documents of the United Nations Conference on International Organizations* 207 (1945) [hereinafter *Documents* Vol. VIII].

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nothing of that kind in the Charter, and this for a very important reason: Article 19 was used by Hitler and the other dictators as a basis for their territorial claims, and if the Assembly were competent to revise treaties at any time, you might have agitation for revision of this or that treaty, and there would never be any stability in the treaties. And what would happen to our own peace which we are going to draft, if at any time afterwards there can be agitation with a view to its revision?³⁹

Later on, during the ensuing debate in Committee II/2, the French delegation once again expressed the view that:

the Conference was trying to change the kind of world where might is righ[t], in which we have lived too long, and if we begin by including an article on treaty revision in the Charter, we shall undermine that attempt. Some treaties give immediate benefits and impose later obligations; if those later obligations are inconvenient, what government could resist the temptation to ask for their revision once it has reaped the early benefits? What individual, a party to a contract, would allow his parliament to intervene and break the contract, and how could a country permit the intervention of the Assembly in the case of a treaty? Only *force majeure* or the action of a court could make such a change.⁴⁰

Colombia opposed any interpretation that gave the General Assembly the power to recommend the revision of treaties and indicated that it should be “stated very clearly that, once and for all, here in San Francisco this problem of the revision of treaties is dead and buried.”⁴¹

The delegate from the Soviet Union:

strongly urged the view that inclusion of any provision on revision of treaties in the Charter would be unsound. To do so would be to contradict the principle of the sovereignty of states upon which the Organization was to be established. He expressed the deep conviction of his Delegation that the task of the Conference was not to shatter the foundations of

³⁹ U.N. Conference on International Organizations, *Verbatim Minutes of the Fourth Meeting of Commission II*, U.N. Doc. 1151 II/17 (June 22, 1945), in *Documents* Vol. VIII, *supra* note 38, at 202.

⁴⁰ U.N. Conference on International Organizations, *Summary Report of Eighteenth Meeting of Committee II/2*, U.N. Doc. 771 II/2/41 (June 3, 1945), in *Documents* Vol. IX, *supra* note 28, at 140 (emphasis in original).

⁴¹ U.N. Conference on International Organizations, *Verbatim Minutes of the Fourth Meeting of Commission II*, U.N. Doc. 1151 II/17 (June 22, 1945), in *Documents* Vol. VIII, *supra* note 38, at 210.

treaties and sow doubts, but to strengthen respect for treaties. It would be particularly dangerous to insert in the Charter a provision which would undoubtedly undermine all the system of agreements with enemy states already concluded and of peace treaties yet to be signed. ... A provision on treaty revision would obviously be used by the enemy states to elude the obligations which will be imposed on them. Thus the Conference might shatter the edifice constructed with so much effort and blood.⁴²

The delegate of Czechoslovakia indicated that:

although his country had faithfully executed its every international obligation in the years before 1938, it had nevertheless been constantly the object of the aggressive designs of its neighbors. He attributed this to the terms of Article 19 of the League Covenant, which had provided a sort of legal cover for the policies of disruption and non-fulfillment of such countries as Germany and Hungary. His Government was therefore unequivocally opposed to the insertion in the Charter, before treaties of peace had even been concluded, of a specific reference to treaty revision
...⁴³

Peru confirmed that “[h]is Government could not accept the inclusion in the Charter of an article on treaty revision.”⁴⁴ The delegation of Chile:

reminded the Committee that the primary object of the Conference was to seek to guarantee peace and security. To this end the Delegation of Chile had voted in favor of giving the Assembly power to make recommendations for the development and codification of international law; and he wished to affirm categorically that if a provision for treaty revision were written into the Charter, peace and security would be imperiled, for respect for treaties is the unalterable basis of peace and security. The intangibility of treaties must be respected, because it must not be forgotten that the surviving fifth and sixth columns of Fascism would seize on any pretext for revision, as would the makers of armaments on anything which would renew international instability. He

⁴² U.N. Conference on International Organization, *Summary Report of Eighteenth Meeting of Committee II/2*, U.N. Doc. 771 II/2/41 (June 3, 1945), in *Documents* Vol. IX, *supra* note 28, at 138–39.

⁴³ *Id.* at 139.

⁴⁴ *Id.* at 140.

considered that frontier treaties, which have been frequently mentioned in this debate, become historical facts once they are fulfilled⁴⁵

The issue was considered in Committee II/2, over three meetings held from 1 to 4 June 1945, on the basis of three questions formulated by Subcommittee A. The questions read as follows:

B. Revision of treaties

1. Should the Assembly be empowered to examine treaties which appear to be inapplicable and to make recommendations to the governments (parties thereto) and to the Security Council with respect to such treaties?
2. Should the Assembly, at the request of any member concerned be empowered to recommend the reconsideration of treaties which become inapplicable?
3. Should the Assembly, at the request of any party to an executory treaty claiming its inapplicability or the injustice of its continuation, be empowered to invite the contracting parties to agree to the revision or cancellation of the treaty?⁴⁶

Upon turning to the discussion of the substance of the three questions, the delegate of the United States took the floor to explain that

although he had originally contemplated a specific allusion in the Charter to the question of revision of treaties, he had foregone this in favor of the broad version of paragraph 6 of Section B, Chapter V, put forward by the four sponsoring governments and France [on 9 May 1945]. It was inconsistent to launch an international Organization based on international integrity and at the same time to intimate any lack of respect for the instruments through which international integrity functions, namely, treaties. He recognized the objections to identifying treaties as such with this paragraph and held that the concern of the Assembly was not with treaties *per se*, but with adjusting conditions which might impair peace and good relations between nations. Considerations of the general welfare may call for a recommendation that a treaty be respected rather than revised. He submitted that it was wiser not to connect the broad version of paragraph 6 with any specific definition

⁴⁵ U.N. Conference on International Organization, *Summary Report of the Nineteenth Meeting of Committee II/2*, U.N. Doc. 790 II/2/42 (June 5, 1945), in *Documents* Vol. IX, *supra* note 42, at 149.

⁴⁶ U.N. Conference on International Organization, *Second Report of Subcommittee A*, 3, U.N. Doc. 416 II/2/A/3 (May 18, 1945), in *Documents* Vol. IX, *supra* note 30, at 347.

regarding treaty revision. The phrase “the peaceful adjustment of any situations, regardless of origin,” in his view, should not be interpreted to mean that the subject of treaty revision was foreclosed to the Assembly. If treaties gave rise to situations which the Assembly deemed likely to impair the general welfare or friendly relations among nations, it could make recommendations in respect of these situations.⁴⁷

The debate on the matter continued for several meetings. In the end, the Committee voted not to consider the three questions proposed by the Subcommittee, *in lieu* of the interpretation of paragraph 6 offered by the United States, which was accepted by the Committee, including the proponents of an express reference to the revision of treaties.⁴⁸ The power of the General Assembly to recommend “measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations . . .,” including situations arising from treaties (under the interpretation offered by the United States), was subsequently incorporated in Article 14 of the Charter. While the idea of including an express reference to the revision *of treaties* was laid to rest, as will be described shortly, the concept of “revision” continued to find favour among some delegations in the broader context of the general rules and principles of international law.

3. The Power to Formulate General Conventions

The third strand of issues identified by Subcommittee A related to proposals that the General Assembly be empowered to formulate general conventions for adoption by states. The Subcommittee prepared two questions. The first question read:

Should the General Assembly be empowered to submit general conventions for the consideration of states which form part of the United Nations Organization and, should the

⁴⁷ U.N. Conference on International Organization, *Summary Report of the Seventeenth Meeting of Committee II/2*, 2–3, U.N. Doc. 748 II/2/39 (June 2, 1945), in *Documents* Vol. IX, *supra* note 28, at 127–28.

⁴⁸ See the views of Belgium, *id.* at 128 (“while he would have liked that treaties should be specifically mentioned, he expressed his support of the interpretation of paragraph 6 given by the Delegate of the United States . . .”), and Egypt, *id.* at 128–29 (“the three questions formulated for discussion by the Committee should be withdrawn because they were amply covered by the interpretation of paragraph 6 given by the delegate of the United States.”), and Mexico, *id.* at 130 (“seconded the motion of the Delegate of Egypt, on condition that the remarks of the Delegate of the United States should go on record as requested.”).

occasion arise, for the consideration of other states, with a view to securing their approval in accordance with their appropriate constitutional procedures?⁴⁹

The question had arisen following an amendment proposed by Belgium, which explained that while the substance of the proposal was, in part, covered by the text of paragraph 6 (of the *Dumbarton Oaks Proposals*), as subsequently amended, on 9 May 1945, on the basis of the proposal by the four powers and France, the element in the last phrase of the proposal “was intended to ensure that states members of the Organization should be required to place general conventions recommended and submitted by the Assembly before their national parliaments for due consideration.”⁵⁰ While some delegations were of the view that the General Assembly was not the appropriate forum for undertaking the drafting of conventions, others “wished it to be quite clear that the power of initiating conventions lay with the Assembly, although, as a practical method, it could set up special committees to do the drafting.”⁵¹ The question was put to a roll-call vote, and although 25 delegations voted in favor, and 13 against, the Chair ruled that the proposed amendment had failed under the two-thirds rule.⁵²

The second question, which was made up of four parts, concerned the possibility of the General Assembly being granted the power to impose conventions. All four sub-questions were put to the vote and failed.⁵³ As with

⁴⁹ *Second Report of Subcommittee A*, *supra* note 30, at 347–48.

⁵⁰ U.N. Conference on International Organization, *Summary Report of Eleventh Meeting of Committee II/2*, 2, U.N. Doc. 536 II/2/24 (May 24, 1945), in *Documents* Vol. IX, *supra* note 28, at 75.

⁵¹ *Id.*

⁵² U.N. Conference on International Organization, *Summary Report of Twelfth Meeting of Committee II/2*, 2, U.N. Doc. 571 II/2/27 (May 25, 1945), in *Documents* Vol. IX, *supra* note 28, at 80. Despite the failure (by one vote) of an express reference being included in the Charter, the power of the General Assembly to recommend treaties for the consideration of the member States of the United Nations was later anticipated in the Statute of the ILC, adopted in 1947. See G.A. Res. 174 (II) (Nov. 21, 1947), amended by G.A. Res. 485 (V) (Dec. 12, 1950) and G.A. Res. 984 (X) (Dec. 3, 1955) and G.A. Res. 985 (X) (Dec. 3, 1955) and G.A. Res. 36/39 (Nov. 18, 1981). In the intervening period, the Assembly has on numerous occasions concluded international conventions, including (but not limited to) when acting under Article 13(1)(a) of the Charter.

⁵³ The four sub-questions were as follows:

a. Should the General Assembly have the power of imposing conventions when, in its opinion, these are mere corollaries of principles it already recognizes as compulsory, or when it believes that that general observance of the obligations embodied in the conventions is necessary for the maintenance of international peace and security?

Decision: Affirmative votes 0, negative votes many (not counted). Question negated.

b. Should this power also be extended to include other conventions?

Decision: Affirmative votes 0, negative votes many (not counted). Question negated.

the proposal to grant the General Assembly legislative powers, the possibility of it being empowered to impose international law in circumvention of national constitutional requirements did not find favor with delegations.

4. Progressive Development

Following Committee II/2's approval, on 9 May 1945, of the proposal by the four powers and France that the General Assembly should, in principle, be empowered to initiate studies and make recommendations for the codification of international law, as well as for promoting the revision of the rules and principles of international law, and taking into account the subsequent outcome of the Committee's consideration of the various questions prepared by Subcommittee A (discussed above), the task of drafting the text of the corresponding provision to be included in the Charter was carried out by Subcommittee B.

In its report, of 5 June 1945, the Subcommittee reported that it had been unable to agree on a single formulation, and accordingly had prepared the following two alternative formulations for the consideration of Committee II/2:

First . . . and also for the codification of international law, the encouragement of its development and the promotion of its revision. . . .

Second . . . and also for the encouragement of the progressive development of international law and for its codification.⁵⁴

The Subcommittee had been divided on the point whether it was essential, in view of the affirmative vote on a question before Committee II/2 at its meeting on 21 May 1945, specifically to include the word "revision." Some members had felt that the words "progressive development"

c. As regards member states, should the Assembly have the power to decide that such conventions shall come into force under the same conditions that may be provided for the coming into force of amendments to the Charter?

Decision: Affirmative votes 0, negative votes many (not counted). Question negated.

d. Should the General Assembly have the power to impose such conventions on non-member states?

Decision: Affirmative votes 21, negative votes 16. Question negated [under the two-thirds rule].

Summary Report of Twelfth Meeting of Committee II/2, supra note 52, at 80–81.

⁵⁴ U.N. Conference on International Organization, *Third Report of Subcommittee II/2/B, 2*, U.N. Doc. 793 II/2/B/10 (June 5, 1945), in *Documents* Vol. IX, *supra* note 28, at 420 (internal quotation marks omitted).

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adequately covered Committee II/2's intention. The Subcommittee had therefore agreed to send alternative versions to the Committee to choose from. The first alternative ("revision") had been supported by five members, and the second alternative ("progressive development") by three members of the Subcommittee.⁵⁵

The majority of opinion in the Subcommittee was reversed in Committee II/2, when the two alternatives were put to a vote. The first alternative attracted only 8 votes, while the second passed with 28 votes.⁵⁶ The summary of the views expressed, during the debate in the Committee, in favour of each alternative is worth reproducing *in extenso* as it sheds light on the intended meaning of the final text of Article 13 (and demonstrates how close the provision came to referring to "revision"):

In support of the specific mention of revision, as in the first alternative draft set out in the report, it was urged that it had been suggested to Committee II/2, at its meeting on May 21, that "development" necessarily implied "revision", and that the Committee, by its vote, had rejected this interpretation, showing that it recognized a distinction between the two. "Development," it was said, meant adding to existing rules; "revision" meant modifying them. Moreover, "revision" should be mentioned in order to avoid the rigidity implied by the mention of "codification" of international law without provision for modification.

In support of the use of the words "progressive development," as in the second alternative draft; it was said that, *juxtaposed as they were with codification, they implied modifications of as well as additions to existing rules*. It was also argued that the first alternative draft, especially in its French version, virtually obligated the Assembly to proceed to revision of international law, an inappropriate task for a political body. "*Progressive development*" would establish a nice balance between stability and change, whereas "*revision*" would lay too much emphasis on change.⁵⁷

Article 13(1)(a) was later included in the text of the Charter, with the second alternative formulation, as proposed by the Subcommittee and approved by Committee II/2 on 7 June 1945.

⁵⁵ *Id.*

⁵⁶ U.N. Conference on International Organization, *Summary Report of Twenty-First Meeting of Committee II/2*, 2, U.N. Doc. 848 II/2/46 (June 7, 1945), in *Documents* Vol. IX, *supra* note 28, at 178.

⁵⁷ *Id.* at 177–78 (emphasis added).

III. CONCLUSION: THE BALANCE BETWEEN STABILITY AND CHANGE

Through a drawn out, and at times contentious, process the drafters of the Charter established a framework for the General Assembly's future work in the development of international law that took into account the lessons of the past, while providing a basis for gradual change in the future. This rested on two assumptions. First, the focus of the Assembly's new mandate would be on the development of general rules and principles of international law, and not the adjustment of any particular existing treaty regime. An unfettered power to impose the revision of established treaty arrangements was expressly rejected as being antithetical to stability. In its place, an understanding was reached by which the General Assembly retained a residual power, under the terms of Article 14, to recommend "the peaceful adjustment of any situation...likely to impair the general welfare or friendly relations among nations," which could include a situation arising from a particular existing treaty arrangement.

Second, in contemplating the further development of international law, the emphasis would be placed on stability, and in particular the stability of the treaty regime on which the new world order rising from the ashes of war would be based. At the same time, there was a recognition among the drafters that the mere codification of existing rules could prevent the evolution of the law necessary to take into account new realities and aspirations. The failure to do so could itself be a source of instability. The challenge facing the drafters was to find the right balance between stability and change—a Goldilocks point between consolidating the *acquis* of the law while looking to the future. But what kind of change was to be permitted, without upsetting the overall balance? What emerged was a carefully calibrated process of gradual change. The General Assembly was expressly not granted the authority to legislate. Furthermore, while the power to impose wholesale revision was also rejected, the end result nonetheless retained a strong quasi-revisionary element (a type of "revision-light").

The key to the understanding the latter point lies in an appreciation of the meaning of change implied in the notion of "progressive development." As the Chair of Committee II/2 noted, in explaining the vote in favour of the final formulation, change implied not only the incremental addition of new rules, as suggested by the word "development," but also, from time to time, the modification of existing rules, which was envisaged by the addition of the adjective "progressive." While sharing a similar meaning to "revision" (modification of existing rules) the composite concept of "progress development" was, to belabor the metaphor, neither too hot nor too cold, but just right, since in the view of the participating governments (no doubt, also

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influenced by the general reception of the concept during the negotiations)
the word “revision” would have skewed the overall balance towards change.